Supreme Court, U.S.
FILED
OCT 14 1993
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93-811

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM POLLEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Third Circuit err in speculating that the district court could infer, based upon an inference, that petitioner had given directions to others prior to petitioner's arrest.

2. Did the Court of Appeals for the Third Circuit err in speculating that the District Court could infer that petitioner had given directions to others prior to petitioner's arrest, when the inference from the facts in the record would logically only permit an inference of the opposite.

3. Did the Court of Appeals for the Third Circuit err in permitting the Government to introduce extraneous alleged facts for the first time in the Government's brief.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTION PROVISION INVOLVED . .	3
STATEMENT OF FACTS	4
REASONS FOR GRANTING THE WRIT . . .	10
I. Does due process encompass the pyramiding of inferences (conflict in circuits) and the inferences do not meet the required standard as set out by this court	
II. May the Circuit Court speculate an inference.	13
III. May the Circuit Court use evidence outside the record.	18

TABLE OF AUTHORITIES

Page

CONSTITUTION OF THE UNITED STATES

THE FIFTH AMENDMENT TO THE CONSTITUTION 2

CASES

Daniels v. Twin Oaks Nursing Home,
692 F2d 1321 (11th Cir. 1982) . . . 7

Maggio v. Zeitz,
333 U.S. 56 (1947) 7

Metge v. Baehler,
762 F.2d 621 (8th Cir. 1985) . . . 7

North Carolin v. Alford,
400 U.S. 25 (1970) 8

Townsend v. Burke,
334 U.S. 736 (1948) 11

United States v. Murillo,
933 F.2d 195 (3rd Cir. 1992). . . . 3

United States v. Pollen,
978 F.2d 98 (3rd Cir. 1992) 3

STATUTES

Title 18 U.S.C. 1512(b)(3) 4

Title 26 U.S.C. 7201 5

Title 28 U.S.C. 1254(1) 1

SENTENCING GUIDELINES

U.S.S.G. . . . . .

U.S.S.G. § 301.1 (a) 3, 4

U.S.S.G. § 301.1 (c) 3, 4

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

No. _____

WILLIAM POLLEN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Wtit of Crtiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, William Pollen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court

of Appeals for the Third Circuit entered in the above titled cause on July 16, 1993.

OPINION BELOW

The memorandum opinion (unpublished) of the Court of Appeals is attached as Appendix A, page 1. No opinion was issued by the district court for the District of New Jersey.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was filed on July 16, 1993. The jurisdiction of this Court is invoked pursuant to 62 Statute 928, 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private porperty be taken for public use, without just compensation.

STATEMENT OF FACTS

On May 3, 1991, William Pollen ("Pollen") entered a guilty plea to four counts of a multicount indictment. Only Count 5 was subject to the Sentencing Guidelines. At the first sentencing Pollen was given an upward departure of four levels for being the leader of five or more other criminally culpable persons (U.S.S.G. § 3B1.1(a)). The sentence was appealed.

On appeal the court of Appeals for the Third Circuit vacated the sentence imposed on Count 5 ("Sentencing Guidelines Count") because the District Court had considered all relevant conduct in determining Pollen's role in the offense. The offense had occurred prior to the amendment allowing consideration of all relevant conduct. United States v. Murillo, 933 F.2d 195 (3rd Cir. 1991).

The Pollen case is reported at 978 F.2d 78 (3rd Cir. 1992).

At the second sentencing on Count 5 (the sentencing guidelines count) the district court without any additional evidence, imposed a two level departure based on U.S.S.G. § 3B1.1(c). Again Pollen appealed. The Court of Appeals for the Third Circuit affirmed with an unpublished opinion (Appendix A, Page 1 through).

Pollen now files this petition for writ of certiorari.

At the second sentencing hearing, neither Pollen or the Government added any evidence to the record concerning the Garretts' actions. On resentencing the district court held:

> At the original sentencing on July 31, 1991, the defendant was considered as a manager of five or more

> participants. Accordingly, he received the four level enhancement under Guideline section 3(B)1.1(a). In complainace with the 3rd Circuit Order filed on October 3, 1992, this Court now determines that defendant was a manager of two participants for the conduct charged on Count Five. Those two participants being Valerie and Carlos [Garrett]. Hence, a two level enhancement under Section 3(B)1.1(c) is appropriate.

The district court had taken judicial notice of the Garretts' pleas of guilty to Count 1 of their indictment at Pollen's first sentencing. Together with the Garrett's plea to a Title 18 U.S.C. § 1512(b)(3) offense the district court had Pollen's PSI or PSR ("Presentence Report") before it at both sentencings.

Pollen appealed the district court's two level upward departure based on U.S.S.g. § 3B1.1(c) at his second

sentencing. The Third Circuit's Panel held that:

> The record substantiates the court's conclusion that Pollen had enlisted Carlos and Valerie Garrett in an effort to keep the assets discribed in Count 5 out of reach of the United States Government.

and

> The reasonable infernce from their [Garretts'] activity is not that it was spontaneous, but was an attempt to assist Pollen. From this, the District Court was entitled to conclude that Pollen's crime, and the Garretts' attempt to cover it up, were set in motion sometime before Pollen was arrested.

Count 5 reads as follows:

> On or about August 22, 1990, in the District of New Jersey, the defendant, WILLIAM POLLEN, a resident of Colonia, New Jersey, did knowingly and wilfully attempt to evade and defeat the payment of a large part of the income tax due and

> owing by him to the United States of America for the calendar years 1967, 1970, 1972 through 1975, and 1982, in an amount in excess of $400,000.00, by placing part of his assets out of the reach of the United States Government by maintaining more than $350,000,00 in gold bars and coins, platinum, jewelry, and gems in safety deposit boxes at the First Union National Bank of North Carolina in a fictitious name, instead of delivering said funds to the District Director of the Internal Revenue Service in Newark, New Jersey.
>
> In violation of Title 26, United States Code, Section 7201.

Pollen was arrested on August 15, 1990, and on August 22, 1990, agents of the Internal Revenue Service seized all of Pollen's assets located at the First Union National Bank of North Carolina. On August 24, 1990, Valerie and Carlos Garrett (Pollen's daughter and son-in-law

respectively) appeared at said bank and requested access to the deposit boxes which had held Pollen's assets.

Pollen pled guilty to Count 5, stating that he had maintained the named assets at the First Union National Bank of North Carolina on August 22, 1990, with the purpose of concealing them from the Government.

Pollen's Presentence Investigation Report ("PSI") was before the district court at both the first and second sentencing.

In the Government's brief before the Court of Appeals, the Government refers over and over to alleged facts from the PSI or PSR of Carlos Garrett. Pollen immediately filed a reply brief and asked the Circuit Court Panel to strike any reference to Carlos Garrett's PSI or PSR for the reason that it was

not in the record before the Circuit Court. The Circuit Court Panel failed to strike the extraneous material and presumably used the alleged facts to reach its conclusion.

REASONS FOR GRANTING THE WRIT

I. THIS IS AN OPPORTUNITY FOR THIS COURT TO REAFFIRM THE HOLDING MAGGIO V. ZEITZ, 333 U.S. 50 (1947).

The third Circuit Panel opines that the district court's conclusion tht the Garretts were attempting to aid Pollen in secreting Pollen's assets set out in Count 5, is supported by the record. To reach this position the Circuit Panel first inferred that the Garretts were attempting to retrieve Pollen's assets (the record clearly shows that no assets

were removed from an location). Then upon this inference the Circuit Panel inferred that the Garretts knew that assets were stored in the safe deposit boxes in the First Union National Bank of North Carolina. Since this chain of inferences was not enough, the Circuit Panel speculated that the district court inferred that Pollen, prior to his arrest, had instructed the Garretts to remove the assets from Pollen's safe deposit boxes. This in not only the third inference in the inference daisy chain constructed by the Third Circuit Panel but is opposite the only logical inference that can be made from the record in this case (see point II. infra.).

It is a violation of Pollen's Constitutional rights to stack inference upon inference to satisfy a lower court's

blood lust. Pollen's due process under the Fifth Amendment has been shattered. Pollen is entitled to the same treatment as to the use of inferences as any other defendant. He did not receive same. This Court held in Maggio v Zeitz, 333 U.S. 50 (1947) that:

> Of course, deference is due to the trial court's findings of fact, as prescribed by our rules, but even this presupposes that the trier of fact be actually exercising his judgment, not merely applying some supposed rule of law.

Pollen is not here relying on the conflict in the circuits as to the admissibility of pyramiding inferences (see Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982) and Metge v. Baehler, 762 F.2d 621 (8th Cir. 1985), but the rule of logic that dictates that as inferences are pyramided

the probability of a reasonable conclusion diminishes geometrically. It is Pollen's contention that none of the three inferences relied on by the Third Circuit Panel can pass muster under the rule set out in Maggio v. Zeitz, ibidem.

II. THIS COURT MUST MAINTAIN "EQUAL PROTECTION UNDER THE LAW" AND "DUE PROCESS" IN THE SENTENCING PROCESS.

Since the inception of the U.S.S.G., defendants have a new "due process" right to be sentenced as others are sentenced. Departures cannot be allowed to be based on speculation, conjecture, suspicion, or mere belief. Read any sentence today and one must realize the sentencing guidelines should be called the sentencing departures. The lower courts

have regainedone-half of their right to sentence at will with the upward departure. It is doubly injurious to the defendant because he/she is lulled into believing that his/her base guideline means something.

The sentencing guidelines are supposed to deliver the same sentence (except for the two or three level downward departure for pleading guilty (acceptance of responsibility)), yet defendants are routinely threatened with thirty or forty years if they go to trial against only a probable five or ten for a plea. The federal penitentiaries are now full of closet "Alford pleas."

The evidence at the first and second sentencing concerning Count 5 is as follows:

1) The Garretts pleaded guilty to

attempting to persuade another person not to inform on Pollen.

2) The Garretts, after Pollen's arrest, went to a number of places and gathered up Pollen's papers, including the National State Bank in Princeton, New Jersy, where Carlos Garrett was a co-holder of the safe deposit box. They removed Pollen's papers to their home.

4) The Garretts went to the First Union National Bank of North Carolina and tried to obtain access to Pollen's safe deposit boxes at said bank. Neither Garrett was a co-holder of any of these boxes, nor was either of their names on the list of persons to have access to such boxes.

5) The record is rife with Government testimony that Pollen was an expert in the banking system of several countries, including the United

States.

From the above evidence, the Third Circuit Panel states it is a reasonable inference that prior to his arrest, Pollen directed the Garretts to remove assets from his safe deposit boxes at the First Union National Bank of North Carolina. This reasoning won't wash. Anyone slightly familiar with National Banks in the United States well knows that to enter a safe deposit box at one of these banks requires his/her signature to be on the bank's records showing he/she is permitted to enter such bank safe deposit box. Pollen would certainly know that sending anyone to these boxes whose name was not on the boxes' would simply draw the authorities attention to these boxes. If prior to his arrest, Pollen had instucted the Garretts to appear at the North Carolina bank, he

would have had at least one of the Garrett's names placed on the bank's records as a party permitted to open such safe deposit boxes. The only inference that can be drawn from the evidence is that the Garretts were volunteers or someone not knowledgeable in banking practice in the United States instructed them to try and get access to the safe deposit boxes.

The record lacks evidence to infer that the Garretts knew the First Union National Bank of North Carolina safe deposit boxes contained assets. Carlos Garrett's name was on the safe deposit box at Princeton, New Jersey, and he must have known that there were no assets in the box. Yet, it was one of the first places visited. One must infer from this that he did not know assets were in the North Carolina safe deposit boxes.

Anyone attempting to retrieve assets surely would go to the assets first.

The only reasonable inference from he evidence placed in the record is that Pollen's lawyer, after Pollen's arrest, instructed Pollen's daughter to gather up all of Pollen's papers and bring them to the attorney's office. This is the normal, ordinary occurance after an arrest of a tax evader. The Garretts did not plead to assisting Pollen to conceal asets, and there is nothing in the record to indicate they were searching for such assets.

III. THE THIRD CIRCUIT PANEL PRESUMABLY USED EVIDENCE OUTSIDE THE RECORD TO ARRIVE AT ITS DECISION.

In its brief on appeal, the Government relied a number of times on

Carlos Garrett's PSI or PSR for alleged facts cited in its brief. Carlos Garrett's PSI or PSR was never introduced at any of Pollen's hearings, was not in the record or reference made thereto was not in the record. Pollen in a reply brief brought this to the attention of the Third Circuit Panel and requested any reference to Carlos Garrett's PSI or PSR be struck. The Third Circuit Panel did not do so, and presumably used the facts given in the Government's brief from outside the record in their determination of the case on appeal.

It is very unusual and certainly a violation of Pollen's due process rights under the Fifth Amendment of the United States Constitution. It is not Pollen's position that the information could not have been introduced at either sentencing hearing, where Pollen would

have had an opportunity to rebut such information, if such information exists. Pollen's position is that it is the careless or designed pronouncement of the opinion on appeal and its basis on a foundation so extensively and materially false, which Pollen had no opportunity to correct, that renders the proceedings and appeal process lacking in due process. See Townsend v Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948).

In conclusion, it must be emphasized that the only reasonable inferences that can be drawn from the record of this case is that Pollen did not instruct the Garretts to proceed to the First Unin National Bank of North Carolina, either before or after his arrest. Pollen did not inform the Garretts that

assets were located in said bank. This Court should vacate the judgment of the Court of Appeals for the Third Circuit with directions. The Third Circuit Court Panel should be admonished that it should strike any statements of alleged fact by the Government not in the record.

If neither of the above has merit of national importance such that certiorari should be granted, this Court should grant certiorari on the basis of a conflict of holdings between the circuits based on whether inferences can be pyramided.

Respectfully submitted,

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APPENDIX

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5718

UNITED STATES OF AMERICA

V.

WILLIAM POLLEN,
Appellant

ON APPEAL FROM THE DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. criminal No. 86-00110-01)
District Judge: Hon. Joseph H. Rodriguez

Submitted Under Third Circuit Rule 34.1(a)
July 12, 1993

Before: SLOVITER, Chief Judge, NYGAARD
AND SEITZ, Circuit Judges

(Opinion filed: Jul 16 1993)

MEMORANDUM OPINION

NAGAARD, Circuit Judge

Appellant William Pollen pleaded guilty to four counts of attempting to evade payment of his personal income taxes. Only one, Count 5, required that a sentence be imposed under the United States Sentencing Guidelines. This offense was committed after November 1, 1987. When the district court sentenced Pollen on Count 5, it found that Pollen had been the leader of five or more criminally culpable persons and computed Pollen's total offense level to be 23, indicating the guideline range of 57 to 71 months of imprisonment.

On Pollen's first appeal from his sentence, we reversed because the district court had considered all relevant conduct in determining Pollen's role in the offense, whereas it should have considered just the conduct related

to the offense charged in Court (sic) 5. United States v. Pollen, 978 F.2d 78 (3d cir. 1992). Pollen was charged in Count 5 with an attempt to evade the payemnt of his tax obligations by maintaining more than $350,000 in gold bars and coins, platinum jewelry, and gems hidden and out of reach of the United States Government. We remanded for the district court to make findings and determine the number of persons whom Pollen supervised, led or manged in the offense described in Court (sic) 5 only. We affirmed all other aspects of Pollen's sentence.

Upon remand, the district court held a second sentencing hearing at which the government contended that Pollen had supervised Carlos and Valerie Garrett and therefore should receive a two-level enhancement for his supervisory role

in the offense. Pollen disagreed and argued that there was no evidence to indicate that the Garretts were "acting on his orders or under his direction ... ." He contended that he was acting alone and that he should receive no adjustment for supervising anyone. The district court found that Pollen had managed these two, who were participants in committing the offense described in Count 5. It imposed a sentence based upon that finding consecutive to the five-year sentence it imposed on the three non-guideline counts. The issue on appeal is whether the district court clearly erred is its factual finding that Pollen exercised a leadership or supervisory role over Carlos and Valerie Garrett and in its conclusion that Pollen should receive a two-level enhancement for his role. We conclude that it did

not.

The record substantiates the court's conclusion that Pollen had enlisted Carlos and Valerie Garrett in an effort to keep the assets described in Count 5 out of reach of the United States Government. When Pollen was arrested, the Garretts immediately began visiting Pollen's cache sites, attempting to retrieve his assets. Two days after Pollen was arrested the Garretts went to the National State Bank in Princeton, New Jersey and emptied Pollen's safe deposit boxes. Later, the Garretts went to the First Union National Bank of North Carolina and there tried to get into Pollen's three safe deposit boxes. The government, however, had gotten there two days ahead of them and had taken the $350,000 in assets contained in these three boxes.

Pollen argues that the could not have supervised the Garretts because he was charged with "maintanining" assets at the bank and the Garretts were simply attempting to "remove" them. We reject this argument. The obvious emphasis of the offense in Count 5 is not his attempts to "maintain" the assets, but to keep the "out of reach of the United States government." The Garretts' activities were clearly an attempt to aid Pollen by preventing the government agents from discovering and confiscating these assets. We hold that by doing so, the Garretts' efforts were "in furtherance of the offense of conviction." See United States v. Murillo, 933 F.2d 195, 199 (3d Cir. 1991).

Next, Pollen argues that because the Garretts did not become involved

in his crime until after he was arrested, he could not have supervised them. This argument is likewise unavailing. The reasonable inference from their activity is not that it was spontaneous, but was an attempt to assist Pollen. From this, the district court was entitled to conclude that Pollen's crime, and the Garretts' attempt to cover it up, were set in motion sometime before Pollen was arrested. Consequently, it is unnecessary for us to decide whether activities performed after arrest can be "infurtherance of the offense of conviction."

In sum, we conclude that the district court's findings are properly supported by the record, and that the district court properly awarded Pollen a two-level enhancement for his supervisory role in the offense. We

will affirm.

TO THE CLERK:

Please file the foregoin memorandum opinion.

s/ R. Nygaard

Circuit Judge